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FEDERAL COMMUNICATIONS COMMISSION
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December 23, 1997

VIA HAND DELIVERY

Magalie R. Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

RE: In the Matter of Telecommunications Services Inside Wiring; Customer Premises Equipment, CS Docket No. 95-184; In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring, MM Docket No 92-260

Dear Ms. Salas:

Enclosed for filing please find an original and ten (10) copies of the Comments of RCN Telecom Services, Inc. in the above-referenced matter. Please date stamp and return the extra copy. Enclosed also is a 3.5 inch diskette containing the Comments in WordPerfect 5.1 format. If you have any questions concerning this filing, please do not hesitate to contact the undersigned.

Respectfully submitted,

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Counsel for RCN Telecom Services, Inc.

Enclosures

cc: JoAnn Lucanik - Cable Services Bureau
International Transcript Services (ITS)

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20054

In the Matter of	)	
	)	
Telecommunications Services	)	
Inside Wiring	)	CS Docket No. 95-184
	)	
Customer Premises Equipment	)	
	)	
	)	
In the Matter of	)	
	)	
Implementation of the Cable	)	
Television Consumer Protection	)	MM Docket No. 92-260
and Competition Act of 1992:	)	
	)	
Cable Home Wiring	)	

COMMENTS OF RCN TELECOM SERVICES, INC.

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Counsel for RCN Telecom Services, Inc.

Dated: December 23, 1997

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SUMMARY

RCN, through subsidiaries in Massachusetts, New York, Pennsylvania and, in the near future, Washington D.C. and parts of Maryland and Virginia, is a facilities-based provider of video, local and long distance telephone and Internet access services. RCN's provision of these services to consumers residing within multiple dwelling unit buildings ("MDUs") is critical to its strategy for entering and competing in video and telecommunications markets with incumbent service providers.

RCN urges the Commission to recognize the competitive obstacles raised by long-term exclusivity provisions in the contracts of many incumbent multichannel video programming distributors ("MVPDs") to serve MDUs, and limit the term of such provisions accordingly. Currently, MDU residents must wait for expiration of the incumbent's exclusive contract, often more than 15 years, before seeking the often superior services offered by RCN and other competing MVPDs. Exclusive contracts should be limited to a term which allows the service provider generally to recover its capital costs of providing service while earning a reasonable profit, but also fosters the ability of MDU residents to have a choice of providers as quickly as possible, particularly in light of today's rapidly advancing telecommunications marketplace. RCN supports a cap on exclusive contracts of five years.

It is imperative, however, that exclusivity provisions in both existing and new MDU contracts be limited on equal terms. Thus, the exclusivity provision in an existing MDU contract should be terminated either once the contract expires of its own accord, or after five years of service by the incumbent, whichever is earlier. The worst possible scenario for advancing competition would be one where cable operators are permitted to keep their long-term exclusive contracts while new innovative providers like RCN are denied the ability to enter similar agreements.

Exclusive contracts are particularly inequitable in mandatory access states because here, only the franchised cable operator enjoys the privileges of mandatory access and thus can nullify the exclusive contracts of competing MVPDs. Competing MVPDs, on the other hand, cannot invoke mandatory access to force its entry into a building already served by the franchised cable operator.

The Commission also should ban agreements in which the incumbent service provider contracts for the exclusive use of the molding or conduit housing its inside wiring. These *de facto* exclusive contracts take advantage of the cable operator's superior familiarity with cable wiring issues and the eventual impact of such agreements. Specifically, MDU managers and residents typically are unaware that the cable operator eventually may rely on this contract provision to continue its control over the "bottleneck" facilities within an MDU, even after expiration of the cable operator's right to provide service within the MDU.

RCN respectfully asserts that, if the Commission seeks to enhance the ability of consumers that reside in MDUs to enjoy the benefits of competition among MVPDs, then the Commission should modify its inside wiring regulations as set forth below.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

In the Matter of Telecommunications Services Inside Wiring; Customer Premises Equipment In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring	))))))))))))))	CS Docket No. 95-184 MM Docket No. 92-260

COMMENTS OF
RCN TELECOM SERVICES, INC.

RCN Telecom Services, Inc. ("RCN"), by its undersigned counsel, hereby submits these Comments on the Second Further Notice of Proposed Rulemaking in the above-captioned proceeding.[1]

I. INTRODUCTION

RCN, through subsidiaries in Massachusetts, New York, Pennsylvania and, in the near future, Washington D.C. and parts of Maryland and Virginia, is a facilities-based provider of video, local and long distance telephone and Internet access services, primarily to residential consumers. RCN has a substantial interest in this proceeding because the ability to offer services to consumers residing

[1] *Report and Order and Second Further Notice of Proposed Rulemaking*, In the Matter of Telecommunications Services Inside Wiring, Customer Premises Equipment, CS Docket No. 95-184; In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Cable Home Wiring, MM Docket No. 92-260, FCC 97-376 (released October 17, 1997) ("Report and Order" or "Second Further Notice").

within multiple dwelling unit buildings ("MDUs") is a vital component of RCN's business plan to enter and compete in video and telecommunications markets with incumbent service providers. RCN endorses the Commission's well-reasoned approach to fostering competition within MDUs set forth in the Report and Order, and submits these comments to assist the Commission in resolving the remaining inside wiring issues, raised in the Second Further Notice, in a manner that further assures that wiring issues do not raise obstacles to competition within MDUs.

II. LONG-TERM EXCLUSIVE MDU CONTRACTS ARE BARRIERS TO COMPETITION AND SHOULD BE PROHIBITED

A. Long-Term Exclusive MDU Contracts Impede Competition

The Commission in the Report and Order recognized several obstacles to alternative multichannel video programming distributors' (MVPDs) entry into MDUs, in particular, the characteristic election by incumbent cable operators to litigate their ownership of the inside wiring rather than respond to competition with improved service.[2] Accordingly, the Commission adopted procedures to enhance the certainty of MDU managers[3] regarding their rights to the MDU inside wiring so that a change in service to the MDU can occur efficiently.[4] The Commission's new procedures will go a long way towards enhancing competition among service providers with respect to those MDUs where a competing provider can get its foot in the door. The Commission must recognize, however, that its procedures may never be employed in the thousands of MDUs where the incumbent service provider has secured an exclusive contract to serve the MDU. In these situations, the captive consumers must wait, sometimes longer than 15 years, for expiration of the

2 Report and Order at ¶ 38.

3 RCN purposely employs the term "MDU managers" rather than "MDU owners" to reflect the fact that many condominiums, cooperatives and other MDUs are managed by representatives of the residents.

4 Report and Order at ¶ 40.

incumbent provider's exclusive contract before seeking the often superior service offered by RCN and other competing MVPDs. Only when an exclusive contract expires may RCN realistically offer its services to MDU residents.

The Commission in the Further Notice found that exclusive contracts can be pro-competitive or anti-competitive, depending on the circumstances involved, and sought comment on several relevant issues including: (1) whether to adopt a "cap" on the length of exclusive contracts and, if so, whether the cap should be based on the MVPD's costs of providing service or its market power;[5] (2) whether the cap could be extended for a particular provider under certain circumstances;[6] (3) whether existing and new contracts should be treated differently;[7] and (4) whether "perpetual" contracts should be subject to special rules.[8] RCN believes that the most equitable answer to all of these questions is that long-term exclusive provisions in MDU service contracts are anti-competitive in all circumstances and should be restricted in all forms and that the Commission rules balance the pro-competitive interest in allowing limited exclusive contracts against the interests of consumers in receiving a choice in service providers. Exclusive contracts therefore should be limited to a term which allows the service provider generally to recover its capital costs while earning a reasonable profit, but also fosters the ability of MDU residents to have a choice of providers as quickly as possible, particularly given the pace of today's rapidly advancing telecommunications marketplace. As discussed more fully below, RCN believes that a cap on exclusive contracts of five years will accomplish these goals.

The Commission is well-aware of the obstacles faced by competing MVPDs seeking to enter MDUs, including the economies of scale of serving an MDU, the incumbent provider's market

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[5] Second Further Notice at ¶¶ 259 - 262.

[6] *Id.* at ¶ 259.

[7] *Id.*

[8] *Id.* at ¶¶ 263 - 265.

power, and MDU managers' objections to the aesthetics of a competitor's network. In RCN's experience, however, competing service providers are often refused access to MDU's because the MDU manager's hands are tied by a long-term exclusive contract. Limiting exclusivity, in combination with the Commission's new procedures, will allow MDU residents to explore the numerous competitive options which are becoming available for the delivery of multichannel video programming.[9]

Limiting exclusivity will not undermine the interests of MDU managers in securing superior terms and conditions from MVPDs for service to the building. Although the privilege to grant exclusive access to one provider sometimes can improve an MDU manager's position in bargaining with MVPDs for service, permitting such privileges on a long-term basis is not the appropriate course. As a preliminary matter, limiting exclusive contracts would not force an MDU manager to change service providers when the exclusive contract expires; rather, it merely would allow the MDU manager to consider his or her options. The MDU manager or residents always could decide to continue the relationship with the incumbent provider, albeit on a non-exclusive basis, or choose to receive service from RCN or some other competitor. A cap on exclusive contracts will promote the interests of MDU managers because it will enhance their ability to secure the best possible mix of price and services for their tenants, and in turn, enhance their ability to compete in the real estate market. If this is the ultimate goal of MDU managers, as they have asserted in urging the Commission to take a hands-off approach, then limiting exclusivity to a reasonable time period is the appropriate course.

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[9] Limiting exclusivity to five years also will allow residents to consider the services of wireless cable providers and satellite master antenna providers ("SMATV"), who often can offer a package of video programming at lower prices than traditional cable operators because their reception technology often is less expensive to deploy, or traditional cable operators, who usually can offer a larger number of the most popular program services because they can extract superior programming discounts from their affiliated programming suppliers.

B. Exclusive MDU Contracts Should be Limited to Five Years

The Commission is correct in its conclusion that exclusive contracts can promote competition in some circumstances, particularly with respect to certain distribution technologies of which certain costs cannot be spread beyond a particular building.[10] Absent an ability to enter an exclusive contract, many such providers simply could not deploy service to many MDUs. Not only must these competing MVPDs assume all the risks of any new telecommunications company that invests a substantial amount of money in new facilities, they also face the additional obstacle of competing against an entrenched monopolist who tenaciously clings to the advantages of its dominant market power. Reasonable exclusive MDU contracts of a limited duration can therefore serve to bring competitive offerings to the market.

The difficult problem faced by the Commission is how to differentiate between pro-competitive and anti-competitive exclusive contracts in a clear, concise and fair manner. An equally important consideration is that the differentiation process does not involve the Commission or the courts in a flood of *ad hoc* determinations.

Basing this differentiation on "market power" or some other quantifiable economic basis simply is too cumbersome to administer. On the other hand, a time limit on exclusivity provisions has the virtues of simplicity, clarity and certainty. As the Commission observed in the Report and Order, the marketplace needs more certainty, particularly in the area of the legal rights and responsibilities of building owners and MVPDs.

> The property owner or subscriber is frequently left with an unclear understanding of why another provider cannot commence service. The litigation alternative, an option rarely conducive to generating competition, while typically not pursued by the property owner or subscriber, can be employed aggressively by the incumbent. The result, regardless of the cable operator's motives, is to chill the competitive environment.[11]

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[10] Second Further Notice at ¶ 258.

[11] Report and Order at ¶ 38.

Accordingly, RCN supports a cap of five years on any exclusivity provision in an MDU service contract. A five-year cap will allow the service provider a reasonable opportunity to recover its capital costs of providing service in the MDU while enabling the MVPD to earn a fair and reasonable profit. This period of exclusivity also will assist, and in many cases be absolutely necessary, for the competing service provider to obtain the financing necessary to install and initiate service. Competing MVPDs must often finance and recover the expense of providing service on a building-by-building basis, which, unlike traditional franchised cable operators, cannot subsidize its investment in a particular MDU with revenues from services provided throughout the franchise area. In addition, without some period of exclusivity, many competing MVPDs cannot generate the good will necessary to withstand the marketplace advantages of the franchised cable operator, once the period of exclusivity expires and should the cable operator be invited into the building to also offer service.

Any extensions or renewals of an exclusive MDU contract following either the initial five-year period must be on a non-exclusive basis. Permitting an MVPD to simply secure a series of five-year exclusive arrangements with an MDU manager would completely undermine the goal of this approach. RCN believes that one caveat is appropriate, however. Where the incumbent provider made a significant new capital investment in the facilities at the property, the provider should be allowed to seek another five-year period of exclusivity. In RCN's experience, a "significant" additional investment means at least 75% of the investment necessary to install and initiate service in a new building. RCN believes that quantifying the costs of initiating new service in the MDU would not be unduly burdensome since the provider will be well-aware of such expenses given the planned significant investment in additional or replacement facilities.

C. The Limits on Exclusive Contracts Must Apply to All MDU Contracts

The unfortunate reality is that exclusivity provisions in MDU service contracts deny MDU residents competitive options that are frequently available to consumers that reside in single family homes and other non-MDU settings. It is critical to fostering competition, therefore, that any limitation on exclusive MDU contracts must apply to all contracts, both existing and in the future. Limiting the duration of new exclusive MDU contracts without a corresponding limit on existing exclusive arrangements would continue the current anti-competitive *status quo*, under which incumbent cable operators and alternative MVPDs with secure exclusive access to MDUs could maintain their stranglehold on MDU consumers while new, innovative competitors such as RCN must wait for exclusive contracts to expire (sometimes more than 15 years) before receiving the opportunity even to demonstrate their services to MDU residents.

Accordingly, it is absolutely imperative that MVPDs seeking new exclusive MDU contracts be treated on equal terms with those MVPDs that already possess this advantage. RCN thus proposes a slightly different transition period for existing exclusive MDU contracts held by incumbent franchised cable operators and other MVPDs. The exclusivity provisions in such contracts should expire no more than five years from the date on which the incumbent provider initiated service at the MDU. Under the same logic as described above, this approach will allow MVPDs to recover their reasonable capital costs of providing service within an MDU while earning a reasonable profit.[12]

Should the Commission decide not to place a cap on existing exclusive provisions, it must not impose a cap on contracts going forward, since such an action would have a disproportionate -- and devastating -- affect on new entrants. Similarly, should the Commission decide to terminate all

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[12] For example, a 15-year exclusive contract secured by a service provider in 1990 would expire upon the Commission's adoption of a rule in this proceeding, since the provider already has enjoyed eight years of exclusivity in which to recover its costs. Similarly, a ten-year exclusive contract signed in 1995 would expire in the year 2000.

existing exclusive contracts on some date certain, such as December 31, 2002, then RCN and other new MVPDs must be allowed to secure new exclusive contracts that extend to that date.

The equal treatment of existing and new exclusive MDU contracts is imperative to RCN's ability to compete, at least with respect to MDUs not already locked-up by some other provider. The worst possible scenario for advancing competition would be one where cable operators were permitted to keep their long-term exclusive contracts while new innovative providers like RCN are denied the ability to enter similar agreements.

D. All Exclusive MDU Contracts Should be Prohibited in Mandatory Access States

Regardless of the procedure adopted by the Commission for limiting exclusive contracts, the Commission must completely ban such exclusive provisions in states where franchised incumbent cable operators enjoy mandatory access to MDUs. Exclusivity is particularly inequitable in these states because only the franchised cable operator can obtain such contract provisions, since the cable operator has the ability to void any such contract provision obtained by an alternative provider.

The Commission has long recognized that state mandatory access laws skew competition unfairly in favor of incumbent franchised cable operators. The Commission first acknowledged this unfair discrimination in a 1990 report to Congress on the cable industry, where it stated, "we believe that discriminatory local mandatory access laws can operate to hinder the growth of alternative distribution services."[13] Most recently, the Commission acknowledged the unfair discrimination of state mandatory access laws in the Report and Order, where it stated, "[w]e remain concerned . . . about disparate regulation of MVPD's that unfairly skews competition in the multichannel video

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13 *In the Matter of Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd 4962 (1990), at ¶¶ 137--140.

programming marketplace. . . . We believe that establishing competitive parity under [mandatory access] statutes will promote competition among MPVDs and will expand consumer choice."[14]

Incumbent franchised cable operators are the double beneficiaries of state mandatory access laws. Only the franchised cable operator enjoys access to MDUs as a matter of statutory right as well as the ability to exclude competitors with exclusive contracts as a matter of common law.

Almost all mandatory access statutes benefit only the franchised cable operator. Thus, in those rare situations where the franchised cable operator is not the incumbent provider within an MDU, the cable operator can overbuild the competing MVPD's MDU facility and nullify at will any "exclusive" agreement between the competing MVPD and the MDU's residents or manager.[15] As a result, incumbent franchised cable operators frequently overbuild competing MVPD's networks within MDUs, and spreads the expense of providing severely discounted over its entire franchise area, where in more than 99% of the cases it enjoys no facilities-based competition, until the competing MVPD succumbs.

On the other hand, when franchised cable operators secure exclusive agreements with an MDU located in a mandatory access state, as frequently occurs, competing MVPDs have no recourse. They cannot have the incumbent franchised cable operators' exclusive rights declared null and void. They cannot afford the expense of litigating the cable operator's right to exclude the competitor, and they cannot afford the expense of the typically long battle to convince a state legislature either to open mandatory access to all MVPDs or to eliminate mandatory access altogether.

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14 Report and Order at ¶ 190.

15 *See, e.g., Matter of 86th Street Tenants Corp.*, N.Y. Sup. Ct. Index No. 105358-93 (Ciparick, J.), New York Law Journal (January 7, 1994) P.1, *aff'd*, 627 N.Y.S.2d 693 (App. Div. 1995); *NYT Cable TV v. Homestead at Mansfield, Inc.*, 111 N.J. 21, 543 A.2d 10 (1988).

The Commission decided in the Report and Order not to preempt state mandatory access laws, instead choosing to rely on its new procedures to lower entry barriers to MDUs.[16] Banning exclusive contracts by franchised cable operators in mandatory access states not only coincides with that approach, it will allow a competing MVPD to get its foot in the door in order to employ the new procedures. Accordingly, RCN strongly urges the Commission to prohibit exclusivity contract provisions in mandatory access states.

E. *De Facto* Exclusive Contracts Should Be Prohibited

A contract, on its face, may not be a building-wide exclusive contract and yet might still operate to exclude competition from a building just as effectively as if it were explicitly exclusive. For example, RCN has encountered use of a kind of *de facto* exclusive agreement in which the incumbent service provider contracts for the exclusive use of the molding or conduit housing its inside wire.[17] On their face, exclusive molding or conduit agreements give the incumbent exclusive control only over the hallway moldings or conduits in an MDU building. In practice, however, these contracts operate just like explicit building-wide exclusive agreements because they preclude access by competitors to the "bottleneck" spaces of a building -- the hallways and conduits -- and thus preclude the installation of competing facilities. These contracts effectively stymie competition throughout a building.

The truly insidious aspect of most *de facto* exclusive agreements is that the MDU manager is often unaware of the provision's implications at the time the agreement is signed. It is RCN's experience that MDU managers often are unaware of the many intricacies of MDU cable construction and the various installation bottlenecks that exist throughout their buildings. When presented with an exclusive molding or conduit agreement, an MDU manager may not find it

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16 Report and Order at ¶ 189.

17 *De facto* exclusive agreements do not include bulk service agreements.

objectionable because, on its face, the MVPD is simply protecting the location of its equipment. It is only when the MDU manager invites a competing provider to offer service in the MDU that the manager discovers that the competitor cannot construct its system because the bottlenecks are "exclusively" controlled by the incumbent provider.

The incumbent cable operators that secure these agreements MVPD of course are well-versed in the particulars of MDU cable construction and fully aware of the significance of controlling the bottlenecks in a building. When such a cable operator obtains an exclusive molding or conduit provision, it fully realizes that it effectively has obtained building-wide exclusivity without ever having to actually negotiate for it, as well as circumventing the spirit of the 1996 Act and the Commission's inside wiring rules and policies. Specifically, the Commission in the Report and Order adopted a rule that "permits an alternative MVPD to install its wiring within an incumbent's existing molding, even over the incumbent's objection."[18] Allowing the continued existence of exclusive molding contract provisions clearly violates both the letter and spirit of this policy. Thus, the Commission should ban all such exclusive molding and conduit contracts.

RCN believes that, if a cable operator or any other MVPD wants building-wide exclusivity, then it should clearly and expressly negotiate for it with the MDU manager as a right separate and distinct from construction issues. In the absence of a clear and express statement that a contract is intended to be exclusive on a building-wide basis, then the exclusive aspects of any molding or conduit agreement or other limitations on moving unused equipment without damaging it should be unenforceable.[19] Otherwise, *de facto* exclusive contracts will emerge as a commonly used vehicle

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[18] Report and Order at ¶ 109.

[19] Incumbents occasionally impose contract limitations on the ability of the MDU owner to move unused cable and other equipment regardless of whether the equipment is damaged by the move. This kind of limitation is not intended to protect the equipment itself but rather to preclude a competitor from moving the incumbent's unused equipment so the competitor's new equipment can be installed in its place. This too is a kind of *de facto* exclusivity. The incumbent MVPD can (continued...)

to circumvent the restrictions the Commission seeks to place on anti-competitive building-wide exclusive MDU contracts.

F. Limiting Exclusive MDU Contracts is Consistent With the 1996 Telecommunications Act and Commission Precedent

The premise of the Telecommunications Act of 1996 is competition.[20] The 1996 Act, *inter alia*, opened telecommunications markets to all competitors,[21] eliminated or reduced various "cross-ownership" bans,[22] and intended generally to "introduce vigorous competition in entertainment and information markets."[23] Long-term exclusivity provisions in MDU service contracts clearly contradict this aim. As described above, such provisions allow an incumbent MVPD to unfairly and needlessly prevent MDU residents from considering the services offered by competing MVPDs such as RCN, and certainly do not introduce "vigorous competition" within a building. Certainly, in this era of enhanced competition in the delivery of telecommunications, data, and to a lesser degree, video services, the Commission should not step backwards by allowing incumbent cable operators to maintain their monopoly in MDUs for whatever period they are able to extract from MDU managers.

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[19](...continued)
protect its equipment by simply requiring the MDU owner to not allow any interference that will damage the equipment. Limitations that are imposed without reference to causing actual damage should be banned as a *de facto* exclusive agreement.

[20] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the 1996 Act").

[21] 47 U.S.C. § 253(a) (removing state or local legal barriers prohibiting any entity's ability to provide telecommunications services).

[22] *See, e.g.*, 1996 Act, §§ 202(e) (broadcasting/cable), 202(i)(6) (cable/MDS and cable/SMATV), and 302 (expanding exceptions to the telco/cable ban).

[23] 1996 Act Conference Report, S. Rep. 104-230 at 178 (February 1, 1996) ("Conference Report).

Limiting exclusivity contract provisions parallels the Commission's approach in similar situations, such as with respect to competition in interexchange markets, where it acted to facilitate the ability of consumers to take advantage of a new, more competitive environment by considering and obtaining service from a new entrant.[24] Similarly, the Commission previously has restricted the ability of communications providers to enter into exclusive contracts when necessary to increase competition and enhance consumer choice. For example, pursuant to the 1992 Cable Act, the Commission prohibited cable operators from engaging in unfair methods of competition or unfair or deceptive acts and practices that hinder the availability of video programming.[25]

G. The Commission Possesses the Authority to Restrict Exclusivity

The Commission possesses the authority to limit both the continued enforcement of exclusivity provisions in existing MDU contracts and the creation of such provisions in new contracts.[26] The Commission's authority to restrict exclusivity may be found in one of several places.

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24 *See generally*, In the Matter of Expanded Interconnection with Local Telephone Company Facilities, 9 FCC Rcd 5154 (1994).

25 47 U.S.C. § 548, 47 C.F.R. §§ 1000 *et seq.*; Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition in Video Programming Distribution and Carriage, 8 FCC Rcd 3359 (1993). *See also* Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast Signal Carriage Issues, 8 FCC Rcd 2965 (1993); 47 C.F.R. § 63.14 (prohibiting carriers authorized to provide international telecommunications services from entering into exclusive affiliation agreements with foreign carriers); 47 C.F.R. § 73.132, 73.232 (barring exclusive agreements between broadcast station licensees and network organizations in a particular territory).

26 *See, e.g., Notice of Proposed Rulemaking,* CS Docket No. 95-184, 11 FCC Rcd 2747 (1996); *Order on Reconsideration and Further Notice of Proposed Rulemaking,* MM Docket No. 92-260, 11 FCC Rcd 4561 (1996); *Further Notice of Proposed Rulemaking,* CS Docket No. 95-184 and MM Docket No. 92-260, FCC 97-304 (released August 28, 1997)

1. Statutory Authority

First, as relied upon to establish the new wiring procedures in the Report and Order, justification for a Commission cap on exclusivity is found in its authority under Sections 4(i) and 303(r) of the Communications Act, in conjunction with the broad regulatory authority invested in the Commission under Title VI of the Communications Act. Limiting exclusivity provisions in MDU contracts is authorized under Section 4(i) because the action is not prohibited by the Communications Act -- in fact, it is encouraged -- and "is necessary to the effective performance of the Commission's functions."[27] We therefore incorporate by reference the Commission's well-reasoned support for its authority to adopt the new wiring procedures.[28]

Second, the Commission could determine that long-term exclusivity contract provisions constitute a barrier to competitive entry, such that any state or local law permitting these provisions should be preempted by the Commission pursuant to Section 253(d) of the 1996 Act.[29] Similarly, the Commission may preempt state laws that permit such contracts if they interfere with federal policies.[30] In this case, the Commission should find that long-term exclusivity provisions interfere with the 1996 Act's goal of fostering competition as well as the Commission's own policies designed to promote competition in the cable industry.[31]

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[27] Report and Order at ¶¶ 83 - 85 citing *Mobile Communications Corp. v. FCC*, 77 F.3d 1399 (D.C. Cir. 1996) *cert. denied*, 117 S.Ct. 81 (1996).

[28] Report and Order at ¶¶ 83 - 101.

[29] 1996 Act, § 253(d).

[30] *See, e.g., Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984).

[31] Conference Report at 178.

2. Fresh Look

RCN recognizes that special considerations may arise with respect to limiting the continued enforcement of exclusivity provisions in existing contracts. In addition to one or more of the approaches mentioned above, the Commission also could adopt a "fresh look" requirement for existing long-term exclusivity provisions in MDU contracts. Aside from program access and discriminatory pricing issues, there is no greater barrier to the introduction of competition in the MDU video marketplace than long-term exclusive MDU contracts by incumbent franchised cable operators. Cable operators have long enjoyed an overwhelming monopoly in the video distribution marketplace.[32] Cable operators have taken advantage of their monopoly to extract long-term exclusive contracts with MDUs. In most cases, a cable operator with an exclusive MDU contract has long since recovered its investment at the MDU property (although in most situations the cable operator can spread this investment over the entire franchise area). Thus, in most cases, the only purpose served by the continuation of such contracts is to frustrate the introduction of competition.

Congress has tried repeatedly to curb cable's monopoly power and introduce competition into the video marketplace.[33] RCN believes that eliminating anti-competitive long-term exclusive MDU contracts is a significant step towards achieving that goal. Accordingly, the MDU owners subject to these contracts should have the reasonable opportunity to open up the exclusivity provisions in MDU contracts so that consumers that reside in MDUs can explore the many options that exist for the delivery of video programming.

As discussed above, giving MDU residents and managers the opportunity to take a "fresh look" at an exclusive contract would not require the MDU to terminate service from the incumbent.

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[32] *See, e.g., Third Annual Report*, In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 12 FCC Rcd 4358 (1997) ("Third Annual Report").

[33] *See, e.g.*, 47 U.S.C. § 548 (Development of Competition and Diversity in Video Programming Distribution), adopted in the 1992 Cable Act.

This approach merely would permit MDU residents to take full advantage of the rapidly advancing and expanding video programming marketplace. The Commission took such an approach with success in the common carrier arena, and there is no reason to expect anything less here.[34] MDU residents' telecommunications needs change over time, and these consumers should not be denied the opportunity to weigh their available options just because they choose to live in an apartment building rather than rent own a single family home.

Fresh look is justified here because cable operators have long enjoyed a dominant position in the market. The Commission repeatedly has made this determination.[35] Exclusivity allows cable operators to further solidify their monopoly because alternative MVPDs are by definition excluded from competing to offer service within the MDU. Limiting exclusivity simply allows the marketplace to work.

H. The Commission Should Include Commercial Buildings in the Limitations on Exclusivity

All of the reasons for limiting exclusive contracts in residential buildings apply to commercial buildings as well. Thus, the Commission can and should make the limitations on exclusive contracts apply to commercial as well as residential buildings.[36]

The fundamental premise for increasing MVPD competition is that the consumer should have the maximum amount of choices possible. The Commission recognizes that when a third party, such as an MDU manager, stands between the consumer and the MVPD, the third party needs to be

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[34] *See, e.g.*, Competition in the Interstate Interexchange Marketplace, 7 FCC Rcd 2677 (1992); Expanded Interconnection with Local Telephone Company Facilities, 8 FCC Rcd 7341 (1993), *vacated on other grounds*, *Bell Atlantic Tel. Co. v. FCC*, 24 F.3d 14451 (1994).

[35] *See, e.g.*, Third Annual Report.

[36] Commercial buildings would include hotels, motels, office buildings and any other non-residential or "quasi-residential" building (e.g. dormitories) in which the permission of a person other than the consumer is necessary for the MVPD to install its equipment.

encouraged to facilitate that choice. This has been one of the guiding principles in the development of the inside wire rules thus far.

Commercial buildings have been and will continue to be an important segment of the multichannel video programming market. The occupants of those buildings should not be ignored in the Commission's concept of "consumers." Like the consumers in residential buildings, the occupants of commercial buildings should have the maximum amount of choice possible in selecting an MVPD.

The owners and managers of commercial buildings have the same concerns as the owners and managers of residential MDU buildings. They want to protect the safety, functioning and appearance of their buildings since their primary business is renting out space to others, whether for a night in a hotel or twenty years in an office building. They have the same incentives as residential building owners to give their tenants amenities and service for reasonable prices. Like residential building owners, the revenues commercial building managers derive from video service need to be reinvested in the property if it is to attract occupants in a highly competitive environment. Like residential MDU managers, many commercial building managers entered into exclusive contracts with incumbent franchised cable operators at a time when the cable operator was the only game in town. The Commission was correct to conclude that "consumer welfare will be maximized by letting the market determine the appropriate mix of price and amenities in the MDU marketplace."[37] The same policy should apply to the commercial building marketplace as well. Accordingly, the limitations on exclusive MDU contracts should apply to commercial buildings and properties as well.

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[37] Second Further Notice at ¶ 61.

VII. Additional Issues

A. Subscribers Should Have the Right to Install Their Own Cable Home Wiring in MDU's

RCN supports giving all residents the right to install their own cable home wiring if they wish, regardless of whether the building is served by a franchised cable operator or non-franchised MVPD.[38] There is no logical basis for discriminating between the two different types of MVPDs for the subscriber or resident to wire their own home as they wish.

B. The Cable Home Wiring Rules should apply to all MVPD's

RCN supports applying the cable home wiring rules in single family homes to all MVPDs.[39] The purpose of the rules is to facilitate competition and there is no logical reason for why franchised cable operators should be treated any differently than non-franchised MVPDs in the disposition of cable home wiring in single family homes.

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38 Report and Order at ¶ 268.

39 *Id.* at ¶ 267.

CONCLUSION

For the reasons discussed above, RCN urges the Commission to limit exclusivity provisions in MDU contracts as barriers to competition. RCN suggests a term of five years. It is imperative that the Commission also restrict exclusivity provisions in existing contracts, or in the alternative, permit new MVPDs to secure new exclusive contracts that approximate the terms in such existing contracts. In any case, the Commission should prohibit all exclusive MDU contracts in mandatory access states and all *de facto* exclusive arrangements.

The interests of consumers in receiving video programming service via the most advanced technology available depends on the Commission's resolution of the Second Further Notice.

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Dated: December 23, 1997

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